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In The

Supreme Court of the United States

October Term, 1977

No. 77-539

ZENITH RADIO CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN IMPORTERS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMERICAN IMPORTERS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Pursuant to Supreme Court Rule 42(3), the American Importers Association, Inc. ("AIA"), hereby respectfully moves for leave to file the attached brief as amicus curiae urging affirmance. Counsel for respondent has consented to the filing of this brief. Counsel for petitioner has not consented.

AIA is a non-profit trade association representing over 1,200 importers, large and small, and allied organizations such

as customs brokers, banks and others servicing the importing community. AIA was founded in 1921 to promote equitable international trade laws and administration.

AIA's interest in the present litigation is threefold. First, we seek to avoid the serious adverse effect on importations into the United States which a reversal of the decision below (where AIA also appeared as amicus) would entail. Very substantial additional duties would be imposed on a multitude of importations from Japan, and quite likely from other countries as well, if the decision below does not stand. Second, AIA seeks to promote United States observance of international agreements in the trade area by pointing out the relevance of our international commitments under GATT in the decision of this case. Third, AIA seeks to avoid the retaliatory measures and the possible prejudice to the Multilateral Trade Negotiations currently in progress in Geneva under GATT sponsorship, which might result from the imposition of countervailing duties in this case.

In support of these objectives, AIA seeks to advance two arguments. The first is a legal and policy analysis demonstrating that no undue favoritism to exports results from the mere remission of an excise tax, and that the Downs and Nicholas results and Section 303 are entirely consistent with the view that such remission is not a proper subject of a countervailing duty. The second point shows that, if the decision below does not stand, the law of the United States as it stood in 1947 would be changed in a direction the GATT Agreement forbids, and the reasonable expectations of other signatories to GATT would be defeated.

Respectfully submitted,

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Amicus, the American Importers Association, Inc. ("AIA"), is a trade association whose membership of over 1,200 represents a broad spectrum of the importing community. AIA's interest in preventing adverse effects on the movement of trade, and in preventing injury to current efforts to build an international legal order in the area of international trade, is more fully set forth in the accompanying motion, to which the Court is respectfully referred. In the light of this interest, AIA urges affirmance of the decision under review.

Summary of Argument

I. Section 303 only imposes countervailing duties on the "net amount" of any bounty or grant. Mere forgiveness or remission of a commodity tax produces no such net benefit. The *Downs* and *Nicholas* decisions only granted relief against such net amounts. There being no net amount on the facts of this case, the Secretary's action in not countervailing is consistent with both judicial decisions and with the statute. The result is a perfectly sensible policy subjecting the exported product to taxation in the country of importation but relieving it of the double taxation petitioner seeks. This permits imports and domestic products to compete on a perfectly fair footing in the United States. The countervailing duty statute, consonant with the overall pattern of United States foreign trade regulations, is aimed only at unfair international competition.

II. The explosive subject of countervailing duties can only be properly regulated by international agreement. The General Agreement on Tariffs and Trade, to which the United States is a party, prohibits countervailing against the mere remission of a commodity tax. The 1947 grandfather clause in GATT is inapplicable because the Treasury interpretation of Section 303 here under attack was well established at the time and not subject to review. A reversal here would defeat the reasonable expectations of our trading partners abroad and raise serious questions as to whether the United States is honoring an international commitment.

ARGUMENT

I. Remissions of the Japanese Commodity Tax Are Not Subject to Countervailing Duties since they Produce No "Net Amount" of Benefit.

A. The Secretary's decision is consistent with law.

This Court has been presented with much discussion about the meaning of *Downs*[1] and *Nicholas.*[2] Little of that discussion

[1] *Downs* v. *United States,* 187 U.S. 496 (1903).

[2] *G. S. Nicholas & Company, et al.* v. *United States,* 249 U.S. 34 (1919).

focuses upon what the Court actually did in those cases. In *Downs,* the Court found that forgiveness of the excise tax and issuance of the transferable certificate were both bounties or grants, but assessed countervailing duties only on the net amount—the value of the transferable certificate. In *Nicholas,* the countervailing duty approved by the Court was against an out-and-out cash bonus. In determining the "net amount" of bounty or grant, the Court in both cases accepted the Secretary's conclusion that only an undue or excessive bounty or grant is to be countervailed, an amount which in *Downs* did not include the excise tax rebate.

The view that only the excessive portion of a bounty or grant is to be countervailed was and remains sound. It penalizes bounties or grants which give exported merchandise an artificial, governmentally created advantage over host country merchandise, but it permits tax laws which place exports on no better than an even footing with host country merchandise.[3]

Section 303[4] does not permit the Secretary to countervail against the exact amount or value of every bounty or grant, only the net amount. This limitation is not inadvertent, and may not be ignored as Zenith would wish.[5] A governmentally

[3] "The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market." *Downs, supra,* at 515. The imposition of ordinary duties and the subjection of imported goods to sales, excise, inventory, and other similar taxes are entirely within the power of the host country. The availability of these powers, not their exercise, is what is relevant to this case.

[4] 19 U.S.C. § 1303 (Supp. V 1975).

[5] "(N)et amount" first appeared in section 5 of the Tariff Act of 1897, 30 Stat. 151, and has appeared in each subsequent reenactment of the countervailing duty law. The concept first appeared in the Tariff Act of August 27, 1894, Paragraph 182 1/2, 28 Stat. 521, in which the exemption of non-excessive tax forgiveness was specifically stated. We can conceive no other purpose for including "net amount" in subsequent legislation than to broaden the exemption to all bounties or grants which are not excessive.

conferred benefit favoring exported merchandise which does not produce "a money reward or gratuity"[6] does not produce a net amount and is not to be countervailed. The Japanese commodity tax law places exports on an even footing with host country products (ignoring the added costs of customs duties, freight, etc., which work against the exported merchandise). It provides no "net amount" to the exporter against which the Secretary may countervail.[7]

As stipulated, the only benefit conferred on exported consumer electronic equipment by the Japanese government is an exemption from the tax on similar articles consumed at home. The exported goods are charged with receiving no more than a benign, economically neutral benefit—freedom from double taxation. Japanese origin consumer electronic products are freed from the burden of the Japanese commodity tax, but remain subject to all applicable federal, state and local taxes in the United States. They may be subject to inventory taxes in Georgia and California or sales taxes in New York and New Jersey the same as any other merchandise held or sold in those jurisdictions. Since they must face taxation in the host country taxing these goods at home would be distorting and anti-competitive. Subjecting such merchandise to countervailing duties would be equally distorting and anti-competitive; it would in effect provide competing host country merchandise with a bounty or grant which the exporting country could not equalize or neutralize.

The Secretary's determination not to countervail against remission or refunding of the Japanese commodity tax, affirmed by the CCPA, is a sensible and reasonable decision

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[6] *Downs, supra,* at 516.

[7] This analysis permits affirmance without deciding whether the per se distinction between direct and indirect tax rebates is correct, as advocated by the United States. It would also be unnecessary to remand, as advocated by Ford, which has moved to appear as amicus, since under our proposed rule there is no countervailable economic benefit to the Japanese exporter on the exported merchandise.

which is consistent with the statute, with Treasury practice, and with what the Court actually approved in *Downs,* and should be affirmed by this Court.

B. The countervailing duty law protects against unfair competition; the Japanese commodity tax law permits fair, not unfair competition.

The limitation on the amount of countervailing duties to be collected under section 303 to the "net amount" of bounty or grant shows that Congress intended to redress unfair competition, not to initiate economic warfare by erecting a discriminatory trade barrier. The amendments to sections 303 and 516 of the Tariff Act of 1930 brought about by the Trade Act of 1974[8] did not change the substantive character of section 303, and do not justify the conclusion that even legislation promoting fair trade is now to be penalized.

United States public policy distinguishing between fair and unfair competition in international trade may be understood by examining the benefits which Congress has conferred on United States exports. Not only is there a significant panoply of risk-equalizing and competition-enhancing programs under the DISC and Export-Import Bank[9] regimes, but even imported articles are frequently benefited by exemption from customs duties if they are to be exported either unchanged or with value added.[10]

One may also compare the statutes which protect against *private* unfair competition from imports, particularly the Anti-

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[8] Trade Act of 1974, §§ 321(f), 331(a), 19 U.S.C. §§ 1516, 1303 (1975). These changes made the administration of section 303 subject to time limits and provided for judicial review.

[9] *I.R.C.* § 991 *et seq.;* 12 U.S.C. §§ 82, 635.

[10] *See e.g.,* 19 U.S.C. § 81(c) (providing customs duty exemptions to merchandise in foreign trade zones), 19 U.S.C. § 1313 (providing drawbacks of duty on imported merchandise manufactured into other articles and exported), and item 864.05, Tariff Schedules of the United States, 19 U.S.C. § 1202.

dumping Act of 1921[11] and section 337 of the Tariff Act of 1930.[12] Section 337 provides that unfairly competing imports may be excluded from the United States. The Antidumping Act, like the countervailing duty law, provides for the neutralization of unfair competition through an equalizing duty. It is most instructive that fair value comparisons under the Antidumping Act are adjusted to account for differences in taxes.[13] If an export price which is lower than home market price on account of remission of taxes on exports does not constitute unfair competition by the exporter, then governmental actions which permit such differences to exist are not unfair competition either.

The benefit provided to exporters by the Japanese commodity tax law permits fair, not unfair, competition. The Secretary should not be required to countervail against it.

II. Imposition of Countervailing Duties Here Would Violate The Obligations of the United States Under the General Agreement on Tariffs and Trade.

Countervailing duties are by their very nature a somewhat civilized form of economic warfare between nations—one nation adopts a plan benefiting its exporters, and another takes action specifically designed to neutralize the effect of the first government's program. The potential for friction and explosion is evident, as is the need for intergovernmental agreement to keep the process within safe bounds.

Whatever the practical possibilities of international regulation may have been when the Tariff Act of 1897 and the *Downs* decision of 1903 appeared, the subject is today regulated by international agreement. Article VI (4) of the General

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[11] Antidumping Act of 1921, § 201, as amended, 19 U.S.C. § 160.

[12] Tariff Act of 1930, § 337, as amended by the Trade Act of 1974 § 341, 19 U.S.C. § 1337 (1975).

[13] 19 C.F.R. § 153.27(a)(3)(vii).

Agreement on Tariffs and Trade ("GATT"), 61 Stat. A24, provides:

> "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to . . . countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."[1]

Plainly the application of this provision would require an affirmance in this case. There is, however, one important complication to be considered. GATT was adopted in 1947 by the United States and other governments signing a so-called Protocol of Provisional Application of the General Agreement on Tariffs and Trade. 4 Treaties and Other International Agreements of the United States of America 1776-1949 at 687. Paragraph 1(b) of that Protocol commits the signatories:

> ". . . to apply provisionally on and after January 1, 1948 . . . Part II of [GATT] to the fullest extent not inconsistent with existing legislation."

This grandfather clause should have no application here, even though Article VI(4), quoted above, falls within Part II of GATT. For it was clear on January 1, 1948 (and for many decades before) that under Section 303 and its predecessors in the United States no countervailing duty was imposed by

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[1] See also Annex I to GATT, Notes and Supplementary Provisions, Ad Article XVI:

> "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." 4 Basic Instruments and Selected Documents, Dept. of State Publication No. 8468, p. 68.

This provision was added to GATT in 1955, effective 1957. *Id.* at 88.

reason of the exemption of exports to the United States from foreign product taxes.

Had the other contracting parties asked in 1947 what the law was in the United States on this question, they would undoubtedly have been told in substance what the United States government told GATT in 1958:

> "The countervailing duty law is found in Section 303 of the Tariff Act of 1930; United States Code 1303.
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> * * *
>
> "Remission of internal taxes borne by a product is one method by which a bounty or grant can be bestowed indirectly. *If the remission does not exceed the amount of taxes previously paid, however, then such remission is not considered a bounty or grant.*" Statement of the United States Concerning Countervailing Duty from "Anti-Dumping and Countervailing Duties," GATT/1958, pp. 138-139 (1958), reprinted in 1 Metzger, Law of International Trade 905, 906 (1966) (italics ours).

Congress provided no judicial review of a negative determination by the Secretary of the Treasury in a countervailing duty case as of 1947 (and indeed not until the Trade Act of 1974).[2] Thus, the Treasury rule—no countervailing against the mere remission of a product tax—was the definitive interpretation of Section 303 under the Congressional scheme which was in

[2] *Downs* and *Nicholas* both involved affirmative administrative determinations imposing countervailing duties as to the net amount of the export subsidy (the certificates in *Downs*, the 3d and 5d in *Nicholas*). These net subsidies were the subject of the judicial review, as noted above.

effect as of 1947. Had the Treasury reading so far departed from the terms of the statute or from the holding in *Downs* as to be plainly erroneous, perhaps our trading partners would have been on notice in 1947 that they should not rely upon the Treasury interpretation. But surely the Treasury position was a perfectly reasonable reading of both the statute and the judicial gloss.

We respectfully suggest that where, as here, there is available a long-standing, reasonable interpretation of a statute which will avoid any question of whether the United States is honoring an international agreement, that interpretation should be adopted over another which would raise just such a question. Cf. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1947). Only in this manner can the reasonable 1947 expectations of the other signatories to GATT be honored.

CONCLUSION

For the foregoing reasons, the decision under review should be affirmed.

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